IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision: 8.3.2007

Crl. Appeal No.126-SB of 2001:

Surjit Kumar Vs. State of Punjab

AND

Crl. Appeal No.465-SB of 2003

Jaswinder Singh @ Binder Vs. State of Punjab

CORAM: Hon'ble Mr. Justice Virender Singh

Present: Ms. Geeta Sharma, Advocate, for appellant Surjit Kumar
Mr. D.R. Punia, Advocate, for appellant Jaswinder Singh alias Binder.
Mr. B.S. Sewak, DAG, Punjab.

Virender Singh, J.

I shall be disposing of the aforesaid two Criminal Appeals vide this common judgment as both are arising out of one and the same FIR bearing No.14 dated 9.3.1997 registered at Police Station Balachaur, under Section 15 of the Narcotic Drugs & Psychotropic Substances Act (for short “the Act”) in which both the aforesaid appellants (for short to be referred to as 'the accused') were booked. Vide impugned judgment dated 21.12.2000 passed by

learned Special Judge, Nawanshahar, Surjit Kumar stands convicted under Section 15 of the Act and has been sentenced to undergo R.I. for ten years and to pay a fine of Rs.1.00 lac, in default thereof to further undergo R.I. for one year whereas Jaswinder Singh alias Binder stands acquitted. However, his truck bearing registration No.PB-08-J-3993 in which the contraband was allegedly recovered, stands confiscated to the State vide impugned order dated 7.2.2003. Aggrieved by the impugned judgment of conviction and sentence, Surjit Kumar has preferred Criminal Appeal No.126-SB of 2001 and Jaswinder Singh alias Binder has preferred his separate appeal (Crl. Appeal No.465-SB of 2003) against the order of confiscation of the truck.

It is worth mentioning here that State of Punjab has not preferred any appeal against acquittal of Jaswinder Singh alias Binder for the main charge of Section 15 of the Act.

In brief, the case of the prosecution is that on 9.3.1997, Inspector Joginder Paul, the then SHO of Police Station Balachaur (PW3) along with other police officials was present in the Police Station at about 5.00 A.M. when he received a secret information that the present two appellants along with other persons were transporting the poppy husk in their truck and if the Naka was set up, they could be apprehended and poppy husk could be recovered. On the basis of the secret information, the formal FIR Ex.PE was recorded.

Thereafter, Inspector Joginder Pal along with other police officials which included ASI Ravinder Singh set up a Naka on the turning of Theri in the area of Balachaur. A message was also sent to DSP Balachaur Amarjit Singh and he also reached the spot. One Makhan Singh Numberdar was also associated. Meanwhile a truck bearing registration No.PB-08-J-3993 came from Mehatpur side which was consequently made to stop. It is then the case of the prosecution that Jaswinder Singh alias Binder, who was on the steering of the truck made good his escape after having alighted from the truck and thereafter DSP Amarjit Singh with the assistance of other police officials carried out the search of the truck. Surjit Kumar appellant was found sitting on the bags lying on the body of the truck and on inquiry he disclosed his complete name, parentage and the address. He was apprised of his right as envisaged under Section 50 of the Act and in this regard his statement Ex.PA was recorded which was thumb marked by him and attested by aforesaid Makhan Singh Lamberdar and ASI Onkar Dutt who were accompanying the police party. Consequently, 10 bags lying in the body of the truck were unloaded and on checking the contents of each bag they were found to be of poppy husk. 25 grams poppy husk was drawn from each bag, turned into parcel and was sealed with the seal of 'AS' (DSP Amarjit Singh). The remainder of each bag was weighed which came out to be 39 Kgs. 750 grams which was put back in the each bag

which were also sealed with the seal bearing inscription 'AS'. Thereafter the sample parcels numbering 10 and an equal number of bags containing poppy husk were taken into possession vide memo Ex.PB attested by Inspector Joginder Paul and the aforesaid ASI Onkar Dutt and Makhan Singh Numberdar. On further search of the truck, registration certificate Ex.PE, route permit Ex.PF, insurance policy of the truck Ex.PG and the summary of the truck Ex.PH were recovered and all these articles were taken into possession vide separate recovery memo Ex.PC, attested by the police officials. The truck was also taken into possession vide memo Ex.PB. Rough site plan Ex.PJ was prepared at the spot. His personal search was conducted vide memo Ex.PK. On return to the Police Station the case property including the parcel samples were deposited with MHC Ravinder Kumar (PW4). On 10.3.1997 ASI Ravinder Singh (PW5) produced Surjit Kumar along with case property before Sub Divisional Judicial Magistrate, Balachaur who after checking the case property initialled the chit affixed on the sample parcels and the bags and passed the order Ex.PM. Jaswinder Singh alias Binder was formally arrested on 11.5.1997 by ASI Ravinder Singh as he had produced anticipatory bail order passed by this Court (High Court) before him. After receipt of the report of the Chemical Examiner Ex.PL, challan against both the accused was filed. They were charged under Section 15 of the Act by the learned trial Court.

In order to substantiate the charge, the prosecution has examined DSP Amarjit Singh (PW1), Onkar Dutt ASI (PW2), Inspector Joginder Paul (PW3), Constable Ravinder Kumar (PW4), ASI Ravinder Singh (PW5) and MHC Ravinder Singh (PW6).

The defence plea taken by both the accused as emerges from their statements under Section 313 Cr.P.C. is of false implication. Surjit Kumar had come up with a denial simpliciter whereas the plea taken by Jaswinder Singh alias Binder was that on 8.3.1997, he had slipped in bathroom at Chandigarh and was taken to General Hospital, Sector-16, Chandigarh as there was sprain in his right leg. He was treated by the doctor of the said hospital who put his ankle under plaster (POP) for which he remained confined to bed for about three weeks. In defence Jaswinder Singh alias Binder appellant had proved prescription slip Ex.DA and got examined Dr. Gurdarshan Singh, Orthopaedic Surgeon, General Hospital, Chandigarh (DW1) with regard to his treatment.

After appreciating the entire evidence, Surjit Kumar stands convicted and sentenced as indicated herein above whereas Jaswinder Singh alias Binder was acquitted for the charge of Section 15 of the Act. However, truck No.PB-08-J-3993 of which he is admittedly the registered owner, stands confiscated to the State.

I have heard Ms. Geeta Sharma, learned counsel for appellant Surjit Kumar and Mr. D.R. Punia, learned counsel for

appellant Jaswinder Singh alias Binder. State of Punjab is assisted by Mr. B.S. Sewak, DAG, Punjab. With their assistance I have gone through the records minutely.

Ms. Sharma submits that the prosecution has not been able to prove the conscious possession of the contraband qua appellant Surjit Kumar. According to her, the evidence on record is that Surjit Kumar belonged to village Janiwal whereas Jaswinder Singh alias Binder was resident of village Muzzafarpur. Surjit Kumar is shown as a labourer whereas Jaswinder Singh alias Binder is shown as transporter which fact is clear from the title of the impugned judgment. The case set up by the prosecution is that Jaswinder Singh after seeing the police party had fled away and Surjit Kumar was found sitting on the bags. Learned counsel contends that even if the case of the prosecution is taken to be true on its face value, it cannot be said that Surjit Kumar was in the conscious and intelligent possession of the bags containing poppy husk. Merely being found to be sitting on the bags would not be a proof enough of conscious possession of prohibited substance, and therefore, in all fairness the police should have conducted further investigation as to the transportation of the poppy bags or the ownership of the same. Dwelling upon her arguments, the learned counsel submits that conscious possession is the sole ingredient in such type of cases which is not in the present case and a poor labourer has suffered

conviction simply being found sitting on the bags.

In support of her aforesaid contentions, Ms. Sharma relies upon a Division Bench Judgment of this Court rendered in ***Tarsem Singh Vs. State of Punjab, 2005 (4) R.C.R. (Criminal) 300*** and Single Bench Judgment of this Court rendered in ***Baldev Singh Vs. State of Punjab, 2005 (1) R.C.R. (Criminal) 823*** and another Single Bench Judgment rendered in ***Surjan Singh alias Kala Vs. State of Punjab, 2005 (4) R.C.R. (Criminal) 897.***

Ms. Sharma has also pointed out certain flaws with regard to the link evidence but primarily she sets store by the aforesaid weakness and prays for acquittal.

Arguing for appellant Jaswinder Singh alias Binder, Mr. Punia submits that the admitted position is that he already stands acquitted by the learned trial Court and against his acquittal the State has not preferred any appeal against acquittal. He then submits that whole of the prosecution case is not free from doubt and, therefore, it cannot be said beyond any reasonable doubt that the recovery was in fact effected from the truck of the appellant. Therefore, the impugned order passed by the learned Special Court Nawanshahar confiscating his truck is not sustainable. Dwelling upon his arguments, Mr. Punia then submits that admittedly Jaswinder Singh was not charged under Sections 25, 26, 27-A or 29 of the Act and, therefore, his nexus with the transportation of the contraband in his truck is not proved by the

prosecution. He was simply charged under Section 15 of the Act for which he already stands acquitted. According to him, the defence evidence led by the accused, otherwise, absolves him of his liability.

Repudiating the submissions advanced by learned counsel for both the appellants, Mr. Sewak submits that recovery of the contraband is proved qua Surjit Kumar beyond doubt as he was found sitting on the bags containing poppy husk for which he could not give any satisfactory explanation. Therefore, presumption under Sections 35 and 54 of the Act has to be drawn against him. He then submits that even otherwise recovery is effected in the presence of a senior police officer (DSP) and, therefore, there is no reason to disbelieve it. Even if there are certain weaknesses in the prosecution case qua the link evidence, the same may be ignored in the light of the other material facts which go in favour of the prosecution, the learned State counsel so contends.

So far as appellant Jaswinder Singh alias Binder is concerned, the learned State counsel submits that may be the State has not preferred any appeal against the acquittal earned by him in the main charge of Section 15 of the Act, still his vehicle which was found carrying the contraband and released on superdari to him could be confiscated to the State. He was duly served notice under Section 60 (3) of the Act to which he had admitted that he is owner of the said truck. He was given opportunity to lead evidence in his favour and

had stepped into the witness-box. The learned trial Court after appreciating the entire case, has passed a detailed order confiscating his truck. According to the learned State counsel, the onus was upon him to prove that the truck was used for transportation of the contraband without his consent and once he has not been able to discharge it, his knowledge shall be presumed and as such he has no escape.

I shall be dealing with the case of appellant Surjit Kumar appellant first of all.

Conscious possession is the core-ingredient to be established before the accused is subjected to the punishment under the Act and the prosecution has to prove the nexus between the accused and the contraband allegedly recovered. No doubt, the onus to prove the absence of culpable mental state lies on the accused but the burden of proof cast on the accused under Section 35 can be discharged through different modes as held by the Hon'ble Supreme Court in ***Abdul Rasid Ibrahim Mansuri vs. State of Gujarat (2000) 2 SCC 523.*** Their Lordships held that the accused can rely on the material available in the prosecution evidence; in addition to that, he can elicit answers from prosecution witnesses through cross examination to dispel any such doubt; he may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in the prosecution case or in the

prosecution evidence are such as to give reasonable assurance to the Court that the appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.

In a latest Full Bench decision of this Court rendered in ***Kashmir Singh and others Vs. State of Punjab, 2006 (2) R.C.R. 477*** it has been observed that the presumptions envisaged under the Act are questions of fact depending upon the case as it appears to be very difficult to lay down any specific mode and method in which the presumption can be raised. Finally it was observed by the Full Bench that no presumption under Sections 35 and 54 of the Act should be used against the accused unless he has been given an opportunity to rebut the presumptions in his statement under Section 313 Cr.P.C. by being called upon to explain the circumstances which give rise to the presumption. Admittedly, in the case in hand, no specific question was put to Surjit Kumar appellant when he was examined under Section 313 Cr.P.C.

I take this case yet from another angle in order to appreciate as to whether on the basis of the evidence on record, the conscious possession of 10 bags containing poppy husk is proved qua Surjit Kumar accused or not. The admitted position before me is that he was neither the driver nor the owner of truck No.PB-08-J-3993.

He was merely found sitting in the body of the truck where bags were lying. It is also clear from the prosecution case that he was a labourer. Admittedly, prosecution has not been able to show his nexus with Jaswinder Singh alias Binder who already stands acquitted for the minor charge. From all these aspects, it can be inferred that he was not exercising the possessory right over the contraband.

In ***Tarsem Singh's case (supra)*** relied upon by Ms. Sharma, the accused was found sitting in the trolley from where 20 gunny bags containing poppy husk were recovered. The accused was neither the owner of the tractor nor the driver. The Hon'ble Division Bench while dealing with the aspect of conscious possession ultimately acquitted the accused observing that no offence under Section 15 of the Act in law is said to have been proved against him. In the aforesaid judgment, the word “possession” was elaborately discussed while taking into account literary meaning of word “possession” from Oxford English Dictionary (Volume II), Webster's Third New International Dictionary (Volume II), Halsbury's Laws of England (Volume 35), Fourth Edition and Corpus Juris Secundum (Volume LXXII).

In my view, Tarsem Singh's case (supra) comes at the rescue of the appellant from all corners.

The case of the appellant is also covered by the view taken in ***Baldev Singh's case (supra).*** In the said case, while

acquitting the accused, this Court relied upon a judgment of Hon'ble Apex Court rendered in ***Syed Mod. Syed Umer Syed Vs. State of Gujarat JT 1995 (SC) 489*** wherein it was observed as under:-

> "Unlawful possession of the contraband is the sine qua non for conviction under the Act and that fact has to be established by the prosecution beyond reasonable doubt. Though possession has not been defined in the Act but has been judicially construed to be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity of the object. There are two essential elements of possession; firstly the corups- the element of physical control and secondly, the animus or intent with which such control is exercised. It is conscious and intelligent possession of any contraband which attracts penal provision of the Act and it is for the prosecution to establish that the accused was found in conscious and intelligent possession of the contraband."

Another latest judgment of Single Bench rendered in ***Karnail Singh Vs. State of Punjab, (***Crl. Appeal No.1087-SB of 2000 decided on 7.6.2006) can also be considered in favour of accused.

As a sequel to the aforesaid facts, the net result surfaces is that the prosecution has failed to prove the conscious possession of the contraband (10 bags of poppy husk containing 40 Kgs) qua Surjit Kumar appellant and, therefore, his conviction as recorded by the trial Court for the charge of Section 15 of the Act deserves to be disturbed

on this vital flaw alone without touching the other aspects of the case. Ordered accordingly.

Let us now advert to the case of appellant Jaswinder Singh alias Binder.

Admittedly, he stands acquitted of the charge of Section 15 of the Act. The conceded position before me is that State of Punjab has not preferred any appeal against his acquittal. What is to be appreciated now is that as to whether under the present set of circumstances, the impugned order of confiscation of truck No. PB-08-J-3993 of which he is admittedly the registered owner, is liable to be confiscated to the State or not. So far as serving of statutory notice under Section 60 (3) of the Act is concerned, the appellant, in my view, cannot raise any objection. He had due opportunity to put up his case. His plea was that on 8.3.1997 he had become immobilized for three weeks on account of injury on his leg. He had produced documentary evidence in this regard. Dr. Gursharan Singh, Orthopaedic Surgeon of General Hospital, Sector 16, Chandigarh, had also stepped into the witness-box to strengthen his plea. The present case was, however, registered on 9.3.1997 on the allegations that he was on the steering of the truck and after seeing the police party had fled away. As stated above, he has now earned acquittal in the main case as the prosecution case qua him is held not to be proved.

The argument advanced by Mr. Punia to the effect that

since Jaswinder Singh alias Binder has been acquitted by the trial Court for the main charge of Section 15, therefore, his truck which was allegedly carrying the contraband could not be confiscated, does not appeal to me. I, however, appreciate his case from another angle so far as confiscation of the truck is concerned. The admitted position is that he was not charged under Section 25 of the Act which deals with the punishment of the owner of a conveyance when he intentionally permits it to be used for the commission by any other person for the purposes of an offence under the provisions of the Act. At the same time, he was not charged under Section 26 of the Act for authorising any person to act on his behalf or even under Section 27-A of the Act for financing illicit trafficking. The other admitted position is that he was also not charged for the offence punishable under Section 29 of the Act for which punishment for abetement and criminal conspiracy to commit an offence under the Act is provided. No doubt, he could not bring any evidence on the file to show that the truck in which the contraband was allegedly recovered, was brought on the road without his consent. But in the absence of any evidence being collected by the prosecution to show his nexus with the transportation of the contraband in his truck, it would not be justified to presume the consent especially when the accused is not charged for the aforesaid offences. Simply on the basis of charge of Section 15 of the Act for which he is otherwise acquitted, no presumption of his

consent in transporting the contraband in his truck can be drawn. The view taken by the learned trial Court that since the appellant being the owner of the truck has not been able to prove that it went missing and, therefore, it was used for transporting of the contraband with his consent, in my view is not correct. The confiscation order is based primarily on the said observation.

In my considered view presumption of culpable mental state of the accused has to be dealt with for the purposes of confiscation of the conveyance in the same manner as it is to be dealt with while deciding the main issue of conscious possession of the prohibited substance qua him and onus can be discharged by him on the basis of the material available in the prosecution case itself. In my view, if the circumstances appearing in the prosecution case are such as to give reasonable assurance to the Court that the owner of the vehicle involved had no knowledge or connivance with regard to the transportation of the contraband, the onus would automatically stand discharged so far as notice issued under Section 60 (3) of the Act is concerned. In the given circumstances of the present case, accused Jaswinder Singh alias Binder has been able to project his bonafides, especially when he already stands acquitted for the main charge of Section 15 of the Act and there being no charge against him under Sections 25, 26, 27-A and 29 of the Act.

In view of the above discussion, the impugned order

dated 7.2.2003, passed by learned Judge, Special Court, Nawanshahar vide which the truck No.PB-08-J-3993 was ordered to be confiscated to the State, deserves to be set aside. Ordered accordingly.

The truck in question is stated to be in the custody of the appellant subject to his furnishing security to the extent of Rs.5.00 lacs as ordered by this Court on 9.5.2003. He shall now be discharged of the said undertaking.

The net result is that both the appeals (Crl. Appeal No.126-SB of 2001 filed by Surjit Kumar and Crl. Appeal No.465-SB of 2003 filed by Jaswinder Singh alias Binder) are hereby allowed.

Appellant Surjit Kumar is stated to be in custody since the date of conviction as he was on bail during trial. He shall be released from custody forthwith if not required in any other case.

(Virender Singh)
Judge

March 8, 2007
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